

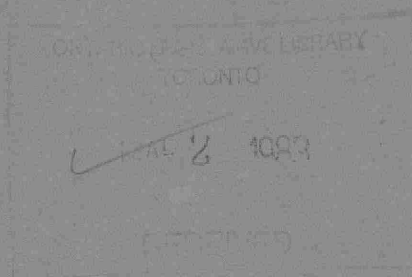
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THE ENVIRONMENTAL ASSESSMENT ACT AND MUNICIPALITIES

October 1977



Ministry
of the
Environment

The Honourable
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Minister

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THE ENVIRONMENTAL ASSESSMENT ACT

and

MUNICIPALITIES

Response to the Report of the Municipal Working Group
Recommendations for the Designation and Exemption
of Municipal Projects under The Environmental Assessment Act

MINISTRY OF THE ENVIRONMENT

Presented by the Honourable George A. Kerr, Q.C.
at the meeting of the Provincial-Municipal Liaison Committee
October 21, 1977

SUMMARY

THE ENVIRONMENTAL ASSESSMENT ACT AND MUNICIPALITIES

This paper identifies, analyzes and prepares solutions for major problems and areas of concern relating to the implementation of The Environmental Assessment Act for municipalities.

The comments received in response to the Report of the Municipal Working Group focus on three major areas: administrative and financial implications of implementing the Act for municipalities; effects of the environmental assessment process at the provincial level would have on municipal projects; and the interrelationship between The Environmental Assessment Act and The Planning Act.

Specific issues identified within these three areas include: the need to ensure that class environmental assessments will be relevant to municipal projects; delay in the issuing of licences and permits under Section 6 of the Act; the need to define more precisely the numbers and types of municipal projects to be affected; and the problems which could be created by the prohibition contained in Section 6 of the Act.

The potential for conflict and duplication between the application, review and hearing procedures of The Planning Act and The Environmental Assessment Act emerges as one of the key concerns in the municipal response to the Working Group Report.

In order to clarify the relationship between the two Acts and the implications of this relationship for municipalities, several points contained in the Report of the Planning Act Review Committee referring to The Environmental Assessment Act's application to municipal and municipally regulated undertakings are discussed. The main points are: the Committee's recommendation that the burden of proof should rest with the public authority to demonstrate that the undertaking is not in the public interest; the Committee's interpretation of the rationale for the broad definition of "environment" contained in The Environmental Assessment Act; and the Committee's presumption that The Environmental Assessment Act will be applied widely to matters adequately regulated under The Planning Act.

Despite the differences identified with some of the issues raised by the Committee, the Ministry of the Environment is in agreement with the Committee's view that all of the relevant planning legislation should be designed to operate in a coherent manner and that duplication should be avoided. The recommendations contained in this paper are designed both to reflect this objective and to respond to the major concerns expressed in the comments on the Municipal Working Group Report.

The recommendations are divided into two sections; one, which responds to the major concerns and another which outlines a strategy for developing a rational and coherent planning process responsive to both municipal and provincial interests within the framework of The Planning Act and The Environmental Assessment Act.

The recommendations in the first group are:

1. THAT TECHNICAL WORKING GROUPS COMPOSED OF A CROSS SECTION OF MUNICIPAL STAFF AND REPRESENTATIVES OF THE MINISTRY OF THE ENVIRONMENT BE ESTABLISHED TO REVIEW THE GUIDELINES RESULTING FROM PROVINCIAL CLASS ENVIRONMENTAL ASSESSMENTS AND REVISE THEM FOR APPLICATION TO MUNICIPALITIES.
2. THAT THE MUNICIPAL WORKING GROUP'S RECOMMENDATIONS WITH RESPECT TO INCLUSION OR EXEMPTION OF CERTAIN TYPES OF MUNICIPAL UNDERTAKINGS BE IMPLEMENTED BY REGULATION WITH THE ADDITION OF AN EXEMPTION PROVISION FOR MINOR PROJECTS, NOT ON THE INCLUSION LIST, BUT WITH AN ESTIMATED COMPLETION VALUE OF LESS THAN \$1,000,000.
3. THAT THE ENVIRONMENTAL ASSESSMENT ACT BE APPLIED TO ALL MUNICIPALITIES.
4. THAT THE PROPOSAL CONTAINED IN THE REPORT OF THE MUNICIPAL WORKING GROUP REGARDING PHASING-IN PROVISIONS BE ACCEPTED.
5. THAT THE SUGGESTIONS CONTAINED IN SUBMISSIONS RESPONDING TO THE MUNICIPAL WORKING GROUP REPORT BE TAKEN INTO ACCOUNT, WHEREVER PRACTICABLE, IN DRAFTING THE REGULATION APPLYING THE ACT TO MUNICIPALITIES.
6. THAT BEFORE IT IS FINALIZED THE REGULATION BE CIRCULATED IN DRAFT FORM TO THE MUNICIPAL LIAISON COMMITTEE, TO THOSE WHO MADE SUBMISSIONS IN RESPONSE TO THE WORKING GROUP REPORT, AND TO ANY OTHER PERSON WHO SO REQUESTS.
7. THAT WHERE PROBLEMS OF LAND ACQUISITION AND ACCESS TO LAND EXIST, THEY BE DEALT WITH ON A CASE BY CASE BASIS.

The recommendations proposing the adoption of a rationalization strategy are based on three principles:

1. CONSIDERATION OF NATURAL ENVIRONMENTAL CONCERNS SHOULD BECOME AN INTEGRAL PART OF THE ADMINISTRATION OF THE PLANNING ACT AT THE LOCAL AND PROVINCIAL LEVEL.
2. THE ENVIRONMENTAL ASSESSMENT ACT SHOULD BE APPLIED TO MUNICIPAL OR MUNICIPALLY REGULATED UNDERTAKINGS ONLY IN THOSE SITUATIONS WHERE IT IS IN THE PROVINCIAL INTEREST TO DO SO.

3. IN ANY AREA WHERE DUPLICATION, OVERLAP, OR CONFLICT REMAINS, AN "OVERRIDE" OR "STREAMLINING" SOLUTION SHOULD BE DEVELOPED.

The report contains specific proposals based on the above principles which are intended to implement the strategy over an appropriate time period.

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THE ENVIRONMENTAL ASSESSMENT ACT AND MUNICIPALITIES

I. INTRODUCTION

I-A BACKGROUND

In December of 1976, the Report of the Municipal Working Group "Recommendations for the Designation and Exemption of Municipal Projects under The Environmental Assessment Act" was circulated to members of the Municipal Liaison Committee, the Municipal Engineers Association and to all municipalities and other interested bodies or individuals. The Report contained the recommendations of the Municipal Working Group, which was established in December 1975, in order to discuss the types of municipal projects which would require an environmental assessment under The Environmental Assessment Act. The Report first clarified the approach taken by the Working Group in determining which projects should be designated or exempted under the Act and then listed the types of municipal projects which were identified as requiring an environmental assessment. It noted also some of the concerns raised by the Working Group regarding the implementation of The Environmental Assessment Act by municipalities and contained a discussion of the extent of application of the recommendations to municipalities.

It should be noted that the Report was not intended to be legally precise; it was written with the intention of explaining the recommendations of the Municipal Working Group so that comments and suggestions from other municipal representatives and the public could be incorporated into the regulations required to implement The Environmental Assessment Act.

I-B FORMAT

It is the intent of this paper to identify, analyze and prepare solutions for major problems and areas of concern relating to the implementation of The Environmental Assessment Act for municipalities. First, an analysis is provided of the major points identified in the responses to the Report of the Municipal Working Group. In addition to discussing the main concerns this section notes those points in the Report which were misinterpreted in certain responses or which appear to require clarification. This is followed by a discussion of some of the issues in the Report of the Planning Act Review Committee which relate to The Environmental Assessment Act and municipalities. Finally, a strategy to implement the Act for municipalities directed toward resolving the problems which have been identified is put forward. The appendix contains a listing of specific issues identified in the responses to the Municipal Working Group's Report and statements of the total number of positive and negative responses. Where necessary, for clarification, a brief explanation of the reasons for the responses has been included.

II. ANALYSIS OF RESPONSE

II-A ATTITUDES TOWARD ENVIRONMENTAL ASSESSMENT

Before categorizing the various comments, the submissions were read to determine the attitude to environmental assessment reflected in them. Generally, the responses were in favour of some form of municipal involvement in environmental planning with reservations expressed about various possible administrative effects which could be associated with the implementation of The Environmental Assessment Act. For example, the need for guidelines, the number of projects to be affected, the implications of using the class EA approach or the phasing-in provisions were noted as areas of concern. In those few cases where the response was completely negative, cost and delay appeared to be the major concerns.

II-B ADMINISTRATIVE AND FINANCIAL CONCERNS

The major concerns in this category were the application of class environmental assessments to municipal projects, the potential delays and costs which could result from implementing The Environmental Assessment Act at the municipal level, and the determination of which municipal projects would require an environmental assessment.

(1) Class Environmental Assessments

The responses clearly indicated that the use of class environmental assessments requires additional explanation. Only one respondent obviously recognized that the projects subject to class EA's would not require individual provincial review and approval. There was widespread agreement that clarification was required with regard to the application of the conditions contained in the approval of the class environmental assessment, especially as to how the province would ensure that the conditions and criteria are implemented, and with regard to the interpretation of the provincial class assessments in terms which would be relevant to municipalities. The latter concern referred both to the problem of reflecting the diversity of municipal projects in the class assessment, for example, between municipal undertakings in northern and southern Ontario and to the difference in scale between provincial and municipal projects and between different sizes of municipalities. It was suggested, in some responses, that the class EA's would need to be rewritten by municipalities to take account of these differences and that guidelines would be required for this purpose.

Part IV of this report contains recommendations which respond to these concerns.

(2) Costs and Delays

Potential increased costs and delays were major concerns identified in the responses. The problems in these categories related mainly to what were described as "unknown factors" involved in implementing the Act for municipalities. In addition to the extra cost and time necessary for the preparation of the document, concerns were that:

- additional staff might be required
- the provincial review could unnecessarily delay the project
- funds would be used for preliminary studies for projects which ultimately, might not be approved by the municipal councils
- the delay in the issuing of licences and permits would unduly restrict municipalities in their planning (Section II C(1) of this report contains a suggested approach which would avoid this consequence)
- delay could be caused by applying the Act to too many projects.
- dangerous situations could be created if the Act would have to be applied in emergency situations and in making on-site adjustments.

Clearly, these concerns are related to factors which are basically unknown at the present time. It is expected that the first environmental assessment prepared by municipalities could cost more and take longer to prepare than later ones. The implementation period will be a learning experience which, with cooperation between the Ministry of the Environment and the municipalities, will provide the basis for a workable process. The class environmental assessment approach will facilitate this also by establishing a model planning procedure which municipalities will be able to use.

(3) Designation and Exemption of Projects

A number of respondents expressed concern about the legal approach to be used to bring municipalities under The Environmental Assessment Act. The Act provides that all public undertakings are subject to the Act unless specifically exempted, while private undertakings are exempt unless specifically designated. Therefore, when Ontario Government ministries and agencies were brought under the Act, those bodies or undertakings judged not to merit environmental assessment were specifically exempted.

The responses suggest that the exemption approach would create difficulties from an administrative and policy standpoint if translated directly to the municipal sector. The large number of municipalities and the wide range of activities in

which they engage make it unlikely that all of the undertakings requiring exemption could be identified in advance of making the Act applicable to municipalities. This would place municipalities and the Ontario Government in the undesirable situation of, respectively, applying for and processing large numbers of exemptions on a regular basis. Uncertainty about which projects required environmental assessment would create unnecessary paperwork and delay as applications to the Minister for exemptions would be required for even relatively minor projects. For these reasons, the responses indicated that the designation of municipal projects would be more acceptable than the exemption approach.

There was widespread agreement that the numbers and types of municipal projects to be affected needed to be defined more specifically. These suggestions dealt with:

- cut-off points used to determine which projects are to be subject to the Act.
- the potential application of Sections 30 and 41(f) of the Act; while some respondents felt application of these sections would provide flexibility, there was one comment expressing concern that they could be applied too often.
- concern that certain projects which are well advanced and therefore eligible for exemption under the phasing-in provisions should, in the public interest, be subject to environmental assessment.

Recommendations reflecting these concerns are contained in Part IV of this review.

II-C THE ENVIRONMENTAL ASSESSMENT PROCESS AT THE PROVINCIAL LEVEL

Many of the submissions raised general concerns about how the environmental assessment process as it would affect municipal projects and policies. The concerns reflected both an uncertainty about the nature of the legislation and the review process which it establishes and about the administrative implications and time schedules at the provincial level.

(1) Extent of Provincial Involvement

Several of the respondents expressed concern that the application of The Environmental Assessment Act to municipalities would allow the province too much control in the area of municipal planning and policy-making.

Underlying these concerns were questions about whether or not those people reviewing the environmental assessment document and the Environmental Assessment Board would take account of municipal interests.

In response to these questions it should be noted that the staff of the Ministry of the Environment who review the environmental assessment documents play a co-ordinating role in the review process, circulating the document to various ministries for comments. A wide range of opinions are therefore reflected in the review. If a hearing is then held by the Environmental Assessment Board there is opportunity for input from the municipalities and the public.

Related to the above points were suggestions that the responsibility for environmental approval be delegated to municipalities (this point is addressed in the recommendations contained in this report) and that Section 6 of the Act prohibiting the issuance of licences, permits, etc. be changed so that municipalities will not be prohibited from, for example, approving budgets, enacting by-laws or entering into agreements with other municipalities.

While Section 6 does prohibit the granting of licences, permits, etc., legal advice indicates that conditional approval could be granted. That is, negotiation prior to approval under the Act could proceed and permits, official plan amendments, funds, etc. could be granted subject to the condition that they become valid or effective only after the required approval under The Environmental Assessment Act has been granted.

(2) Land Acquisition

A number of respondents felt that the possibility that the municipality may be prohibited from acquiring land for an undertaking subject to the Act, before an environmental assessment is carried out and approvals obtained under the Act, could create additional problems. One suggestion was to consider an amendment to The Expropriations Act which would impose a freeze while the process is underway if property acquisition is involved. Another suggestion was that municipalities should be able to take conditional options on lands prior to receiving EA approval.

Recommendations dealing with this issue are made in Part IV of this report.

II-D CONCERN FOR PLANNING ACT/ENVIRONMENTAL ASSESSMENT ACT INTERRELATIONSHIPS

(1) Conflict Between EAA and Planning Act

Although several respondents expressed concern that there would be duplication or conflict between The Environmental Assessment Act and The Planning Act, a general opinion was

conveyed that The Planning Act and Official Plans could reflect more environmental concerns than they do at present. Many referred to the need for intensive study of the interrelationship between the two Acts and for discussions between the Ministry of Housing and the Ministry of the Environment with a view to streamlining the separate processes.

Recommendations which take account of these suggestions are made in Part IV of this report.

(2) Duplication of Hearings - EAB/OMB

Potential duplication of hearings of the Ontario Municipal Board and the Environmental Assessment Board was a major concern. There were a number of suggestions directed toward establishing a joint hearing system or streamlining the processes. The Ministry of the Environment recognizes the problems which could occur and makes recommendations in Part IV of this report with the objective of alleviating them.

II-E ADDITIONAL CONCERNS

(1) Screening Criteria

The screening criteria used as a basis by the MWG for determining which municipal projects could require an environmental assessment were criticized by several respondents on the grounds that they were too vague, broad and subjective and that there was no clear indication as to weighting of importance between the various criteria.

In fact, the criteria were appended to the Municipal Working Group Report only as an indication of the issues considered in reaching a "first cut" judgment as to whether an undertaking needed environmental assessment, might need it in some circumstances, or should be exempted. The criteria are recognized to be arbitrary and subjective, and are not intended, by themselves, to render decisions on the status of a project.

In the Municipal Working Group, judgments as to designation or exemption were made on the basis of past experience and it was concluded that input from municipalities regarding the designation and exemption of projects would provide further clarification for determining cut-off points for specific projects. In effect the criteria were used only as general guidelines in narrowing down the possible designations and exemptions.

A procedure for using and interpreting the criteria is available from the Ministry of the Environment but was not published in the Working Group Report. In retrospect, its inclusion would have alleviated the concerns expressed about the criteria.

III. REPORT OF THE PLANNING ACT REVIEW COMMITTEE

The potential for conflict and duplication between the application, review and hearing procedures of The Planning Act and The Environmental Assessment Act emerges as one of the key concerns in the municipal response to the Working Group Report. In its Report, the Working Group had noted that the Report of the Planning Act Review Committee would perhaps help to clarify the relationship between the two Acts and strongly suggested that the Ministries of Environment and Housing work to resolve the potential conflicts and duplication.

The Report of the Planning Act Review Committee (hereinafter referred to as the "Committee") has now been available for municipal scrutiny for several months. While the Committee's Report focuses mainly on the reform of The Planning Act and the municipal planning system, it does touch briefly on The Environmental Assessment Act and advances several recommendations concerning the Act's application to municipal and municipally regulated undertakings. (Chapter 17, Sections 17.20 to 17.35, pages 152-156).

Municipalities have rightfully insisted that Provincial actions in response to the Report of the Municipal Working Group on Environmental Assessment and to the Report of the Planning Act Review Committee should be mutually complementary and designed to integrate and streamline the planning process.

In this section, the Ministry of the Environment:

- A. outlines and responds to the main issues arising from the Planning Act Review Committee's environmental assessment proposals,
- B. comments on several other related matters raised by the Committee and,
- C. summarizes this reaction and states conclusions.

III-A MAIN ISSUES

(1) Burden of Proof

The Committee expresses concern about the conflict in philosophy between The Environmental Assessment Act's stance that a proponent should bear the burden of proof to demonstrate that an undertaking should be allowed to proceed, and the Committee's recommendation that the burden should be on the public authority to demonstrate that the undertaking is not in the public interest (17.23).

On the grounds that proponents should accept responsibility for the consequences of their actions, the Ministry of the Environment takes the position that the person who is proposing to alter the state of the environment should take the responsibility for justifying the change. However, the Ministry recognizes that there is also a responsibility on the part of Government reviewers to justify their evaluation of the proposal. Where conflicts persist between proponent and reviewers, neither side is presumed to be right as the "Burden of Proof" concept might suggest; rather, the decision-maker in the environmental assessment process comes to a determination by evaluating the evidence on both sides.

The Committee's views on "Burden of Proof" have rather serious practical implications for both the provincial and municipal levels of government. Under the Committee's proposals, governments would be required to permit a proposed development unless the governments could demonstrate that the proposal was unacceptable. The governments would thus be put in the position of financing and carrying out the basic data collection and planning studies which are now put together by the proponent. In the Ministry of the Environment's view, the costs of providing data and staff for every project being proposed (including the large number which never get beyond the proposal stage) make the Committee's approach impractical.

On both philosophical and practical grounds, as set out above, the Ministry of the Environment rejects the Committee's "burden of proof" recommendation.

(2) Definition of "Environment"

A second major area of disagreement with the Committee concerns the broad definition of "Environment" used in The Environmental Assessment Act. The Report of the Committee indicates a serious misinterpretation of the reason why "Environment" has been defined in the Act to cover not only the "natural environment" but also the human environment, including social, economic and cultural concerns.

The broad definition resulted from suggestions by other ministries (especially Treasury, Economics and Intergovernmental Affairs; then responsible for regional planning and the administration of The Planning Act) during the interministerial consultations which preceded the release of the Green Paper on Environmental Assessment in September, 1973. While the Ministry of the Environment had put forward a proposal for environmental assessment dealing only with the "natural environment", the other agencies argued successfully that to conduct a project assessment solely on natural environment considerations would result in a document essentially useless to decision-makers. Rather than place each agency in the position of setting up its own parallel process requiring a proponent to submit an assessment dealing with its particular concerns (e.g. social,

economic, cultural, energy, technical, etc.), it would make sense to build all of these concerns into a single assessment document. Each agency would then be in a position to participate in a decision-making process where trade-offs could be explicitly identified and assessed and an overall Government decision made on whether a project's advantages outweighed its disadvantages and thus should be allowed to proceed.

The Planning Act Review Committee has obviously misunderstood this point. It repeatedly misconstrues The Environmental Assessment Act as resulting in "environmental approvals" and not in a Government decision in principle on whether an undertaking should be allowed to proceed (Sec. 6.27, 17.26, 17.32, 17.33, 17.34). The most explicit indication of the Committee's misinterpretation of this issue is found in the statement: "We are also concerned whether the Authority for determining that given economic or social changes should be allowed in a municipality should be assigned, in the final analysis, to the Environment Ministry, whose primary interest is matters of natural environment". (17.26)

In the actual working of the environmental assessment process, the economic and social aspects of the proponent's environmental assessment would be circulated for review to the agencies primarily responsible for these concerns (Ministry of Treasury, Economics and Intergovernmental Affairs, Ministry of Industry and Tourism, Ministry of Community and Social Services, Ministry of Culture and Recreation, etc.). The role of the Ministry of the Environment would be to coordinate this review.

Where conflicts arise amongst the reviews of the various government agencies, the Ministry of the Environment will attempt to get the relevant agencies to work out a solution. If no agreement can be reached, the matter is not resolved by the Ministry of the Environment, rather it will be referred upwards to the affected Deputy Ministers, Ministers or ultimately the Cabinet until a solution is reached.

As for "the final analysis", which must be the "go/no-go" decision, The Environmental Assessment Act clearly indicates that this decision is not made by the Ministry of the Environment alone, but rather by the Cabinet. The Committee's misinterpretation of this basic point represents a serious flaw in its reasoning, and invalidates the proposals stemming from its concerns about the broad definition of "environment".

(3) Extent of Potential Conflict and Duplication

The third main area of disagreement with the Committee also appears to arise from a basic misunderstanding by the Committee of the Government's approach to implementation of The Environmental Assessment Act. A number of the Committee's proposals (See 17.26, 17.29, 17.32, 17.34) apparently relate to a presumption by the Committee that the Government intends to

apply The Environmental Assessment Act extensively to the matters now regulated under The Planning Act. Based on this presumption, the Committee expresses concern that there will be a large number of projects subject to both The Environmental Assessment Act and The Planning Act with the possibility of extensive conflict and duplication in application and hearing procedures.

The Ministry of the Environment recognized the potential for overlap and duplication between the Ontario Municipal Board and the Environmental Assessment Board at the time The Environmental Assessment Act was being drafted and has repeatedly indicated its willingness to work on methods of resolving the potential problems. During 1974, as the proposed legislation was being considered by Cabinet, the Ministry agreed to and participated in a committee appointed by the Attorney General "to investigate methods of minimizing the number of hearings on undertakings to which The Environmental Assessment Act, 1974 will apply or of consolidating such hearings." In its report to the Attorney-General the Committee concluded:

"...the difficulties in the way of adopting a general formula for substituting hearings by the Environmental Assessment Board for hearings by other tribunals or consolidating all hearings are insuperable...For these reasons the Committee is of the opinion that each undertaking or class of undertaking to which the Act is applied will have to be considered individually to determine whether there is an avoidable duplication of hearings. The Committee is informed that the Government will probably move slowly in extending the application of the Act to different undertakings or classes of undertakings and provision should be made at the time of any extension for minimizing duplication of hearings where this is practicable. One possibility would be to provide that ...after a hearing by the Environmental Assessment Board, the material put before the Board would be admissible on the relevant issues in subsequent hearing, avoiding duplication to this extent."

The Ministry of the Environment has carefully followed this advice in implementing the Act. In fact, a basic criterion for determining whether the Act should apply to a given class of undertakings is the adequacy of the existing approvals and hearing processes to which the class is subject. For example, the Minister of the Environment has clearly stated to the Legislature that The Environmental Assessment Act would not have general application to the residential housing industry in Ontario. This eliminates a large area of potential overlap between The Environmental Assessment Act and The Planning Act and their respective hearing processes.

The Planning Act Review Committee has apparently overlooked the Government's repeated statements that The Environmental Assessment Act is intended to apply only to under-

takings of major significance. As a consequence of the Committee's misconception that the Act will be applied to ordinary developments, the Committee has greatly overestimated the potential area of conflict between The Environmental Assessment Act and The Planning Act and proposed solutions which, in face of reality, are inappropriate or unnecessary.

Nevertheless, the Ministry of the Environment agrees with the view of the Committee that The Environmental Assessment Act should be directed at "developments of truly major or provincial significance" and has reflected this view in its administration of the Act to date. The Ministry recognizes - as did the Municipal Working Group - that since some such developments (although by no means all of them) will also be subject to The Planning Act, streamlining solutions are required for these situations. Recommendations are advanced later in this review.

III-B OTHER ISSUES

There are a number of other issues in the Committee's proposals on environmental assessments which, in the opinion of the Ministry of the Environment, merit comment.

(1) Holding By-laws

The Committee maintains (Sec. 17.24) "that holding by-laws can produce close to the desired results of The Environmental Assessment Act with respect to natural environment concerns". While the Committee's proposals with respect to holding by-laws can provide municipalities with a useful environmental management tool in environmentally sensitive areas by allowing time for review, this device by itself is unlikely to achieve the objective of The Environmental Assessment Act with respect to the natural environment. By definition, the kinds of areas for which the Committee proposes that holding by-laws be allowed are the areas where a municipality, assuming the burden of proof as suggested by the Committee, is going to face the most expense and difficulty in attempting to anticipate the effects of development proposals. Moreover, as The Environmental Assessment Act does not focus only on the natural environment, but seeks to balance all relevant effects of the undertaking and reasonable alternatives in order to arrive at an optimal solution, the holding by-law device hardly seems to be a suitable or sufficient substitute if a development of truly major or provincial significance is under consideration.

This is not to suggest that the Ministry of the Environment advocates the application of The Environmental Assessment Act to all development in the kinds of areas where the Committee proposes the use of holding by-laws. Suggestions for a more adequate procedure are outlined later in this review.

(2) Municipal Plans and Environmental Assessment

The Committee makes suggestions with regard to municipal plans being excluded from The Environmental Assessment Act (Sec. 17.28, 17.29). While at present the Ministry does not propose that they be included, it does have some reservations about the implication of this proposal occasioned by the Committee's view on comprehensiveness and legal status of municipal plans. If official or municipal plans were comprehensive (as they are now supposed to be), had legal status (as now) and contained policies satisfactory to the Ministry of the Environment on the natural environment there would probably be no need to subject them to an environmental assessment under the Act. This in fact, is the position arrived at by the Municipal Working Group on Environmental Assessment.

Recommendations pertaining to municipal plans are presented in Part IV of this report.

(3) Social and Economic Impacts

Apparently related to the Committee's misconception of the purpose and rationale for the broad definition of "environment" is a seeming ambivalence toward the consideration of social and economic impacts in decision-making. The Environmental Assessment Act provides an explicit framework for the consideration of social and economic impacts with respect to the major kinds of undertakings to which it will apply. Recognizing that much remains to be learned about social impact assessment, the Act reflects a consensus that it is nevertheless important to attempt to address social and economic issues. Where the treatment of these issues is subjective or speculative, as it often will be, this can be made obvious to both decision-makers and the public by explicitly identifying the assumptions on which the evaluation is based.

It should be emphasized that by being concerned with social and economic changes The Environmental Assessment Act is not attempting to prevent changes in Ontario communities but, rather, to manage change, to ensure that the changes which could result from an undertaking are clearly stated at a time when they can still be accommodated and when alternative approaches can still be implemented. This concept of "wise management" which is an explicit purpose of the Act was obviously totally misunderstood by the Review Committee, as reflected in the footnote on page 153 of the Report. In addition to suggesting that the planning process the Act envisions is designed to prevent rather than manage change, the footnote indirectly implies that the identification of potential social and economic changes should be avoided because it might lead to decisions based on prejudice. Surely the protection against such abuse lies not in ignoring the issue but in the exercise of the provincial interest in "ensuring civil rights and natural justice in the administration of municipal planning"? (Quotation from Summary, Item 1, Page 1)

(4) Private Sector Designation

The proposal that specifications for those private sector undertakings requiring an environmental assessment be written into the Act would create inflexibility and make the Act a less useful decision-making tool. The Government needs to be able to apply the Act, and its prohibition against proceeding, without delay where it is in the provincial interest. The constraints of time and priority to which legislation is subject suggest that changing provincial and municipal policies or social and economic realities might not be readily taken into account in determining when an environmental assessment should be carried out. In effect the system would be less responsive. Moreover, the fact that private undertakings may only be brought under the Act by designating regulation, authorized by statute, should satisfy the Committee's interest in ensuring that administrative action stems from proper authority.

III-C SUMMARY OF REACTION TO THE COMMITTEE'S ENVIRONMENTAL ASSESSMENT PROPOSALS

There are three fundamental issues on which the Ministry of the Environment is in disagreement with the Committee's environmental assessment proposals: The "burden of proof" issue, the Committee's interpretation of the rationale for the broad definition of "environment", and the Committee's presumption that The Environmental Assessment Act will be applied widely to matters adequately regulated under The Planning Act. On the first of these issues we have indicated a basic disagreement in principle; on the second and third issues we believe the Committee has formed its conclusions on the basis of a misunderstanding of the intent of The Environmental Assessment Act. The Committee has based its proposals for action with respect to environmental assessment in large part upon its assumptions in these three areas, and the Ministry of the Environment therefore concludes that the Committee's environmental assessment proposals are not acceptable in their present form.

Despite these differences, the Ministry of the Environment is in full agreement with the Committee's view that all of the relevant planning legislation should be designed to operate in a coherent manner, that duplication should be avoided and procedures be as straightforward and direct as possible, and that there be a clear identification of who is making the ultimate planning decisions and on what basis the decisions are made (See 17.35). The Ministry has further concluded that in responding to the Report of The Planning Act Review Committee, the Government has an unprecedented opportunity to rationalize and streamline the planning process. In this spirit, the Ministry has critically looked at the relationship between The Environmental Assessment Act and The Planning Act and has developed what it believes is a constructive approach to resolving the potential difficulties. This approach is set out, along with implementation proposals based on the response to the Municipal Working Group's Report, in the following section.

IV RECOMMENDATIONS

The previous sections have identified the major concerns expressed by the respondents to the Report of the Municipal Working Group and the main differences between the recommendations of The Planning Act Review Committee and the Ministry of the Environment with respect to the implementation of The Environmental Assessment Act for municipalities. The following section contains two major groups of recommendations which, respectively:

- A. respond to the major concerns expressed in the comments on the Municipal Working Group Report regarding the administrative implications of implementing The Environmental Assessment Act for municipalities.
- B. outline a strategy for developing a rational and coherent planning process responsive to both municipal and provincial interests within the framework of both The Planning Act and The Environmental Assessment Act.

The recommendations are intended to both facilitate the implementation of the Act for municipalities and to resolve many of the possible problems particularly with reference to the relationship between The Planning Act and The Environmental Assessment Act, which have been identified.

IV-A IMPLEMENTATION OF THE ENVIRONMENTAL ASSESSMENT ACT FOR MUNICIPALITIES: ADMINISTRATION

1. IT IS RECOMMENDED THAT TECHNICAL WORKING GROUPS COMPOSED OF A CROSS SECTION OF MUNICIPAL STAFF AND REPRESENTATIVES OF THE MINISTRY OF THE ENVIRONMENT BE ESTABLISHED TO REVIEW THE GUIDELINES RESULTING FROM PROVINCIAL CLASS ENVIRONMENTAL ASSESSMENTS AND REVISE THEM FOR APPLICATION TO MUNICIPALITIES.

The Ministry of the Environment recognizes that class environmental assessments would be a good means to establish a planning process consistent with The Environmental Assessment Act while avoiding a review process for every project. It is felt that a transitional period will be required during which the provisions in the provincial class assessments will have to be revised for application to municipal projects.

In addition, consultation with municipal representatives will have to take place in order to discuss problems and questions which might arise and to develop guidelines where necessary. The Ministry of the Environment proposes to make the class environmental assessments available to municipalities well ahead of the time they are to come into effect in order to facilitate this consultation. An interim exemption would be provided for the various classes of activities identified for class treatment by the Municipal Working Group.

2. IT IS RECOMMENDED THAT THE MUNICIPAL WORKING GROUP'S RECOMMENDATIONS WITH RESPECT TO INCLUSION OR EXEMPTION OF CERTAIN TYPES OF MUNICIPAL UNDERTAKINGS BE IMPLEMENTED BY REGULATION WITH THE ADDITION OF AN EXEMPTION PROVISION FOR MINOR PROJECTS, NOT ON THE INCLUSION LIST, BUT WITH AN ESTIMATED COMPLETION VALUE OF LESS THAN \$1,000,000.

It appeared that, from an administrative standpoint, this approach would be the best solution in view of the difficulty of identifying all activities of all municipalities which should be exempt. The \$1,000,000 cutoff point would mean exemption orders would not be required for minor activities not specifically identified for inclusion under the Act, thus minimizing the number of exemption orders to be processed yet providing for the screening of more significant activities. Exempting regulations would be enacted for types of projects not meriting environmental assessment as they were identified through the screening process.

3. IT IS RECOMMENDED THAT THE ENVIRONMENTAL ASSESSMENT ACT BE APPLIED TO ALL MUNICIPALITIES.

Based on the response to the Report of the Municipal Working Group, it was determined that the requirement for the environmental assessment should be determined by the type of undertaking rather than the proponent.

4. IT IS RECOMMENDED THAT THE PROPOSAL CONTAINED IN THE REPORT OF THE MUNICIPAL WORKING GROUP REGARDING PHASING-IN PROVISIONS BE ACCEPTED.
5. IT IS RECOMMENDED THAT THE SUGGESTIONS CONTAINED IN SUBMISSIONS RESPONDING TO THE MUNICIPAL WORKING GROUP REPORT BE TAKEN INTO ACCOUNT, WHEREVER PRACTICABLE, IN DRAFTING THE REGULATION APPLYING THE ACT TO MUNICIPALITIES.
6. IT IS RECOMMENDED THAT BEFORE IT IS FINALIZED THE REGULATION BE CIRCULATED IN DRAFT FORM TO THE MUNICIPAL LIAISON COMMITTEE, TO THOSE WHO MADE SUBMISSIONS IN RESPONSE TO THE WORKING GROUP REPORT, AND TO ANY OTHER PERSON WHO SO REQUESTS.

Two years of provincial-municipal dialogue on this subject have already taken place. Therefore, comments would be requested within a relatively short period of two or three months.

7. IT IS RECOMMENDED THAT WHERE PROBLEMS OF LAND ACQUISITION AND ACCESS TO LAND EXIST, THEY BE DEALT WITH ON A CASE BY CASE BASIS.

It is recognized that the prohibition (s.5(1)) against buying land for an undertaking subject to The Environmental Assessment Act before an approval for the undertaking may create difficulties for proponents in some situations. The Ministry of the Environment has carried out a background study of this potential problem and identified a number of alternative techniques for resolving the difficulties. Several additional techniques have been suggested by municipalities in their response to the Municipal Working Group. Review of the various techniques has led the Ministry to conclude that no one technique is appropriate for all situations. For example, a public authority with expropriation powers can handle the problem in ways not available to most private sector proponents. Further, as several municipalities have pointed out, some techniques (e.g. imposition of confidentiality, exclusion of site alternatives from the environmental assessment, or exemption of land acquisition) are less preferable than others from the perspective of the purpose of The Environmental Assessment Act. It is expected that as experience is gained, patterns will become evident and the Ministry will be in a position to legislate a more general solution.

IV-B IMPLEMENTATION OF THE ACT: PLANNING PROCESS

While the above recommendations are being implemented, it is proposed that the municipalities in co-operation with the Ministry of the Environment implement a strategy directed toward establishing a coherent and rational planning process within the framework of The Planning Act and The Environmental Assessment Act. The strategy has been designed to be phased in gradually so that municipalities can begin by working within the proposals put forward by the Municipal Working Group and then implement the other proposals over an appropriate time period.

(1) Principles On Which Strategy Is Based

The purpose of The Environmental Assessment Act is "the betterment of the whole or any part of Ontario by providing for the protection, conservation and wise management in Ontario of the environment". The Ministry of the Environment suggests that there is no inherent conflict between this goal and the Planning Act Review Committee's goal of achieving a rational, coherent planning process responsive to both municipal and provincial interests.

Given that the goals are not in conflict, the Ministry of the Environment further suggests that there is no reason why the legal and administrative mechanisms for achieving these goals

cannot be rationalized. Towards this end, the main recommendation of the Ministry of the Environment is the adoption of a rationalization strategy based on three principles:

1. CONSIDERATION OF NATURAL ENVIRONMENTAL CONCERNS SHOULD BECOME AN INTEGRAL PART OF THE ADMINISTRATION OF THE PLANNING ACT AT THE LOCAL AND PROVINCIAL LEVEL.
2. THE ENVIRONMENTAL ASSESSMENT ACT SHOULD BE APPLIED TO MUNICIPAL OR MUNICIPALLY REGULATED UNDERTAKINGS ONLY IN THOSE SITUATIONS WHERE IT IS IN THE PROVINCIAL INTEREST TO DO SO.
3. IN ANY AREA WHERE DUPLICATION, OVERLAP, OR CONFLICT REMAINS, AN "OVERRIDE" OR "STREAMLINING" SOLUTION SHOULD BE DEVELOPED.

(2) Proposed Strategy

In order to implement the proposed strategy outlined above, the Ministry of the Environment makes the following specific proposals:

1. Implement the recommendations arising from the Municipal Working Group Report, as set out in section A, above.
2. Allow municipalities to establish policies and procedures to protect the "natural environment" and make such plans and procedures subject to the approval of the Minister of the Environment.
3. Provide for The Environmental Assessment Act to apply to municipal undertakings or municipally-regulated private undertakings which fall within criteria defining the provincial interest. The criteria would be interpreted by the municipality, subject to Provincial intervention. Suggested criteria are:
 - a) Significant effects are outside of jurisdictional* boundaries of municipality.
 - b) Some alternatives which should be considered are outside jurisdictional boundaries.
 - c) Undertaking is primarily intended to serve people not mainly within the municipality.
 - d) Areas or features which are provincially significant.
 - unique
 - scale
 - e) Developments which affect the ability of the Province to attain stated objectives (natural environmental, social, economic).

* jurisdictional - mandate and spatial

- f) Undertakings involving the management, development or use of a resource in a way which affects the interests of people outside the jurisdictional boundaries of the municipality.
 - g) Undertakings which must be carried out in the interests of a wider client group than within the jurisdiction of the municipality.
 - h) Undertakings which may affect the Province's financial well-being.
 - i) In cases where decision-making authority does not have an environmental plan and decision-making process acceptable to the Minister of the Environment.
 - j) Performance criteria for specific scale or type of undertaking.
 - k) X% Provincial funding which places projects in Provincial sphere.
- 4. Exempt or not designate undertakings where the municipality has an environmental plan, a decision-making process acceptable to the Minister and where the undertakings are not within the criteria defining provincial interest.
 - 5. Where an acceptable regional environmental plan is in place, allow the region to determine whether the area municipality environmental plans are acceptable, subject to provincial approval or override.
 - 6. Establish a procedure for regular updating of environmental components of plans and re-evaluation of the provincial interest criteria.
 - 7. Provide that in cases where both The Environmental Assessment Act and The Planning Act apply, and a hearing is required under The Environmental Assessment Act, no hearing on the same undertaking may be required under The Planning Act and subsequent decisions for actions under The Planning Act must comply with approval under The Environmental Assessment Act.

IV-C ACTION ON RECOMMENDATIONS

- 1. IT IS RECOMMENDED THAT THE PROPOSALS SET OUT IN SECTIONS IV-A AND IV-B BE PROCEEDED WITH IMMEDIATELY ON THE UNDERSTANDING THAT ADJUSTMENTS WILL BE MADE IF REQUIRED AS A RESULT OF ACTION ARISING FROM THE PLANNING ACT REVIEW OR IF INDICATED BY EXPERIENCE IN THE COURSE OF IMPLEMENTATION.

APPENDIX

I. NUMBER OF RESPONSES

As of October 14, 1977, the Ministry has received 34 written submissions in response to the Municipal Working Group's Report. These include: 26 submissions from municipalities; 3 from municipal organizations; 1 from a consulting company; 1 from a special interest group; and 3 from different sections in the Ministry of the Environment. All are available for inspection by the public in the Main Library of the Ministry, 1st floor, 135 St. Clair Ave. W., Toronto.

DISTRIBUTION OF RESPONSE

II. ATTITUDES TOWARD ENVIRONMENTAL ASSESSMENT

Out of the 28 submissions where an opinion was expressed about environmental assessment in general, 20 indicated that they were in favour of environmental assessment and could perceive a need for municipal involvement in the process. Nine of these 20, however, indicated that a learning or clarification period would be necessary before municipalities could be prepared to participate in the process. There were 3 other submissions in agreement with this need for an extended period to prepare for environmental assessment who did not explicitly state their agreement with the concept reflected in The Environmental Assessment Act. There were 2 responses which stated explicitly that they disagreed with environmental assessment and the need for municipal involvement in the process.

III. ADMINISTRATIVE AND FINANCIAL CONCERNS

1. Class Environmental Assessments

Agree with approach - 19

Disagree with approach - 1

Clarification and Circulation Required - 13

While 9 of the responses explicitly expressed agreement with the concept of class environmental assessment as it was to be applied to municipalities, 5 of these expressed concern that there be additional clarification of the approach to be taken. The one expression of disagreement was due mainly to a concern that the conditions and criteria contained in the approval of class environmental assessments would be unable to reflect the diversity and complexity of municipal projects, in particular, as reflected in the differences between northern and southern Ontario. Even in this case, however, there was agreement that if the problems could be solved, in certain situations a class environmental assessment would be useful.

2. Costs

Concern for the potential increased cost to municipalities - 23

Cost should be absorbed by the Ministry of the Environment - 3
(of the 23).

3. Delay

Predict delay - 14

4. Guidelines

Request for guidelines for preparation of document - 6

5. Staff Pressures

Predict requirement for additional staff - 10

6. Phasing-In Provisions

Agree with criteria - 4

Disagree with criteria - 2

Disagreement related to the recommendation that the criteria for exemption of projects which are well advanced include that "construction contracts have been awarded". It was felt that this would penalize those projects requiring extended design periods, in particular where considerable capital spending had taken place over the design period. There were also suggestions in two responses that there be some means of evaluating the municipal council's decisions in certain cases even if the project is well advanced.

7. Permits For On-Site Investigations

Predict difficulty in carrying out on-site investigations on private property - 2

IV. THE ENVIRONMENTAL ASSESSMENT PROCESS AT THE PROVINCIAL LEVEL

1. Delay

Concern that review and approval process would create delay - 8

2. Exemption/Designation Approach

In favour of designation approach - 5

In favour of exemption approach - 1

In favour of both approaches - 2

Concern that application of S.30 and 41(f) too general - 1

3. Adequacy of MOE Staff

Concern about adequacy of MOE staff to enforce Act - 4.

It was felt that if there were not enough staff to review the environmental assessment documents, delay and complications would occur. One suggestion was to use the MOE Regional Offices more to enforce the Regulations.

4. Role of Provincial Government

Perceived increase in "watchdog" role of Province - 5.

Implicit in the statement was disapproval of the role. The concern was related to the opinion that the Province should not interfere, in particular, in the area of existing municipal decisions based on established official plans.

5. Establish Review Mechanisms at Municipal Level

Delegate environmental approval to municipality - 2.

It was felt that an arrangement of this type would be more readily integrated with existing planning procedures. It was not clear, however, if the environmental assessment would then be submitted to MOE.

6. Section 6, EAA: Issuance of Licences, Permits, etc.

Identified problems with Section 6 of Act - 6.

Concern related to the potential restriction of municipal initiatives, particularly with regard to taking options on land. Problems identified also involved the approving budgets, enactment of by-laws or official plan amendments, and agreements with other municipalities or levels of government. It was stated that Section 6 appears to prohibit a municipality from initiating other steps in the approval process, where environmental assessment is required. This could create complications and delay.

A specific problem was identified by the Municipality of Metropolitan Toronto. Section 65 of the Municipality of Metropolitan Toronto Act permits acquisition of land for sanitary landfill purposes only with the approval of the municipality in which the land is situated; or failing that, with the approval of the OMB subject to a public hearing. Section 6 would prohibit this.

7. Land Acquisition

Identified land acquisition as a problem - 17

In favour of ensuring the examination of site alternatives - 1

V. CONCERN FOR PLANNING ACT/ENVIRONMENTAL ASSESSMENT ACT
INTERRELATIONSHIPS

1. Conflict Between EAA and Planning Act

Concern that there would be duplication or conflict between EAA and Planning Act - 15

2. Duplication of Hearings - EAB/OMB

Concern - 24

Establish Joint Hearings - 10

Develop a Streamlining Process - 6

Foresee Difficulty in Streamlining Process - 2

VI. ADDITIONAL CONCERNS

1. Application of EAA to Which Municipalities?

Four submissions referred to the question of which municipality should be subject to The Environmental Assessment Act. Suggestions included:

- should refer to location instead of geographic area;
- should be based on minimum population (particularly with regard to cities and towns);
- should apply to all municipalities with cut-off point

2. Minister's Discretion

There was one expression of concern that "the essential aspects of environmental assessment are not contained in the legislation, but are to be left to the Minister's discretion in the accompanying Regulations."

3. Screening Criteria

Concern with screening criteria - 6

Criticism of the screening criteria related to:
- they were too broad;

- they were vague;
- the definition of "significant" is questionable;
- economic significance is the key and should have been a priority.

4. Continue Municipal Working Group Meetings

Two respondents indicated that they would encourage the continuation of Municipal Working Group meetings.

5. Review of Application to Municipalities

Four respondents requested that a review process by MOE be established in order to evaluate the municipal role in environmental assessment after a few years.

6. Circulation of Draft Regulation

There were 7 requests for the circulation of the draft Regulation before final legislation is approved.

VII. PROJECTS: COMMENTS ON RECOMMENDATIONS

Following is a summary of comments which referred to the recommendations for an environmental assessment to be carried out for specific projects;

1. Bridges and Causeways

Unnecessary - 1

Cut-Off Point Required - 1

The "unnecessary" comment referred to a "simple modification of a water crossing."

2. Channelization and Flood Control

Unnecessary and clarification required - 1

Need for cut-off points in relation to size - 1

It was felt that the definitions of these projects were too general and could become too extensive, for example, there was concern that "site manipulation of authority-owned lands for recreation" could apply to any small adjustment that is made.

3. Communications Towers

One respondent expressed concern that the rigid technical requirements which must be accommodated in the construction of communications towers be taken into account before regulating these projects.

4. Electrical Utilities

Clarification required - 1

Respondent suggested a cut-off point of 230 kV in order to avoid the need for environmental assessment for local municipal utilities.

5. Drainage Projects

Should be exempt - 1

Designate both urban and agricultural tracts with stipulation that if exempt in certain cases, all relevant authorities be consulted - 1

6. Parks

A potential contradiction was identified (in Metro Toronto) between the designation of parks on an individual basis and the projects under the "Channelization and Flood Control" category referring to "site manipulation of (Conservation) Authority-owned land" which would require an EA.

There was one other comment referring to parks which expressed concern that open green spaces be protected as much as possible.

7. Roads

Designate major expansions or upgrading of existing alignments - 1

Develop a cut-off point for roads so that minor projects would not be subject to environmental assessment - 2

8. Sewers, Waterworks and Associated Facilities

Cut-Off Point Required - 1

Clarification Required - 2

One respondent noted that, in both this category and with regard to transportation facilities, the environmental assessment should be confined to examination of alternative methods of carrying out a proposal undertaking when the facility is required to implement an official plan and is identified before the plan is signed by the Minister of Housing.

9. Transit Systems

It was suggested by one respondent that facilities for buses equivalent to those for light and heavy rail systems i.e. marshalling yards and maintenance facilities, should require an environmental assessment. It was felt that such facilities for buses cause a greater adverse effect on the environment than

many of those for trains. In particular, it was felt that exhaust fumes and noise from the vehicles could create problems and that it was extremely difficult to abate the problems once the facilities were established.

10. Waste Management Systems

Environmental Protection Act satisfactory for environmental assessment of waste management systems - 1

Clarification is required on whether EA's will be done for:

- (a) Pumping Stations and Deep Wells.
- (b) Existing Waste Disposal Sites.
- (c) Spring Clean-up Sites.

Noted that particular attention should be paid to sludge disposal - 1

11. Waterfront Plans

While there was agreement that municipal waterfront plans should be included, 1 submission noted that the Working Group did not address the problem from the multi-jurisdictional aspect. It referred to the possibility that there is considerable overlap among Transport Canada under the Navigable Waters Act, Environment Canada, Ministry of Natural Resources (Licences of Occupation) and the Ministry of the Environment.

There was also one respondent who noted the need to define the minimum size and/or length of interface above which this provision would apply.



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